Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES AND THE NEW JERSEY DIVISION OF RATE COUNSEL

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SUMMARY

On November 2, 2012, the Ad Hoc Telecommunications Users Committee, BT Americas Inc., Cbeyond, Inc., Computer and Communications Industry Association, EarthLink, Inc., MegaPath Corporation, Sprint Nextel Corporation and tw telecom inc. filed a petition ("Ad Hoc Petition") to reverse the forbearance granted to Verizon, AT&T, legacy Embarq, Frontier and legacy Qwest with respect to dominant carrier regulation and certain *Computer Inquiry* requirements with respect to their provision of packet switched and optical special access services. The comments filed that oppose the Ad Hoc Petition fail to substantiate their claims of robust competition and their claims that granting the petition would impede the nation's goal of broadband deployment. NASUCA and the New Jersey Division of Rate Counsel ("Joint Commenters") reiterate the recommendation set forth in Rate Counsel's comments that the FCC reverse its premature granting of forbearance and apply dominant carrier regulation to non-TDM-based special access services to prevent incumbent local exchange carriers from exercising market power.

It is clear that the analysis that the FCC conducted when it granted forbearance was based on an outdated approach, and one that the FCC has appropriately replaced with the more rigorous and economically-sound approach used in the *Phoenix Forbearance Order*. The FCC should apply the data-driven, analytically-sound examination of the structure of relevant geographic and product markets for non-TDM-based special access services that the FCC conducted in the Qwest's Phoenix forbearance proceeding.

Consumers benefit from well-functioning special access services markets. Granting the Ad Hoc Petition will make those benefits more likely.

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I. INTRODUCTION

The New Jersey Division of Rate Counsel ("Rate Counsel")[1] and the National Association of State Utility Consumer Advocates ("NASUCA")[2] (together, "Joint Commenters") reply to the comments submitted last month[3] regarding the petition filed by the Ad Hoc

[1] Rate Counsel submitted initial comments in support of Ad Hoc's Petition.

[2] NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority. NASUCA did not submit initial comments in response to Ad Hoc's Petition.

[3] Comments were filed by AT&T Inc. ("AT&T); CenturyLink; COMPTEL; Hawaiian Telcom, Inc. ("Hawaiian Telcom"); Independent Telephone & Telecommunications Alliance ("ITTA"); Level 3 Communications, LLC

Telecommunications Users Committee, BT Americas Inc., Cbeyond, Inc., Computer and Communications Industry Association, EarthLink, Inc., MegaPath Corporation, Sprint Nextel Corporation and tw telecom inc. to reverse the forbearance granted to Verizon, AT&T, legacy Embarq, Frontier and legacy Qwest with respect to dominant carrier regulation and certain *Computer Inquiry* requirements with respect to their provision of packet switched and optical special access services ("Ad Hoc Petition" or "Petition").[4]

II. REPLY TO COMMENTS

Overview

Generally, incumbent local exchange carrier ("ILEC") commenters oppose Ad Hoc's Petition[5] and competitive local exchange carrier ("CLEC") commenters support the Petition.[6] Hawaiian Telcom urges the Commission to deny the Petition[7] because the non-TDM based special access service market is "vibrantly competitive and in no need of regulation."[8] AT&T describes the broadband optical and packet-switched services market as an "unqualified

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("Level 3"); Members of the Midwest Association of Competitive Communications, Inc. ("MACC Members" supporting the filing include Cbeyond Communications, Inc.; Earthlink, Inc.; First Communications, LLC; MegaPath Corporation; Socket Telecom LLC; TDS Metrocom LLC; tw telecom inc.; and XO Communications, LLC); and Verizon and Verizon Wireless ("Verizon). These comments rely on the redacted versions of comments (e.g., CenturyLink also filed a confidential version of its opposition to Ad Hoc's Petition).

[4] *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Petition of Ad Hoc Telecommunications User Committee, BT Americas, Cbeyond, Computer and Communications Industry Association, EarthLink, MegaPath, Sprint Nextel, and tw telecom to Reverse Forbearance From Dominant Carrier Regulation of Incumbent LECs' Non-TDM-Based Special Access Services, November 2, 2012 ("Petition").

[5] AT&T, at 1; Verizon, at 1; Hawaiian Telcom, at 1; CenturyLink, at 1; and ITTA, at 2.

[6] MACC Members, at 1; Level 3, at 1; COMPTEL, at 1.

[7] Hawaiian Telcom, at 1.

[8] Id., at 2.

regulatory success story,"[9] and declares that competition is "entrenched and irreversible."[10] AT&T faults Ad Hoc's Petition on three basic fronts: according to AT&T, the FCC can only adopt new rules through a notice of proposed rulemaking (as required by the Administrative Procedure Act ("APA"); the petition does not demonstrate that current market conditions warrant new regulations; and the FCC did not actually adopt the "market power" test from the Phoenix Forbearance Order.[11]

In sharp contrast, MACC Members support the specific steps that the Petition outlines: reversal of forbearance and, where carriers possess market power, the application of the tariffing and pricing rules to non-TDM-based special access services that are now applied to TDM-based special access service.[12] MACC Members further support the adoption of service quality standards for non-TDM based special access services.[13] Level 3 supports the Petition for several reasons,[14] including that the FCC did not analyze market power in the relevant geographic or product markets but "relied instead on a standard that has now been replaced by one state in the *Qwest Phoenix Forbearance Order*."[15] Joint Commenters concur with Level 3's recommendation that the Commission re-evaluate the market using the *Phoenix Forbearance Order* standard.[16] Level 3 also contends that the FCC incorrectly counted non-facilities-based

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[9] AT&T, at 3.

[10] Id., at 2.

[11] Id., at 3-4.

[12] MACC Members, at 7.

[13] Id., at 7.

[14] Level 3, at 1.

[15] Id., at 2.

[16] Id.

providers as competitors,[17] and furthermore states that the FCC erroneously assumed that non-TDM purchasers are "sophisticated" and can make "informed choices." Joint Commenters concur with Level 3 that, in markets with only a single supplier, the level of a buyer's sophistication is irrelevant to an assessment of market power.[18]

Comments emphasize that the non-TDM-based special access service market is a growing and increasingly important market.

Comments demonstrate that the non-TDM-based special access market is becoming more critical to competition in many parts of the telecommunications industry,[19] which underscores the importance of the FCC taking timely action to correct its premature grant of forbearance. As both supporters and opponents of the Petition have indicated, enterprise non-TDM based special access service is "a multi-billion dollar business, impacting a significant number of businesses."[20] Furthermore, the market affects downstream retail broadband markets for enterprise, mobile and small business services.[21]

Joint Commenters concur with MACC Members, who suggest that the competitive harm that has resulted from the FCC's forbearance is growing because of the growing share of non-TDM services such as Ethernet and that as DSn services are replaced by Ethernet, ILECs'

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[17] Level 3, at 2, stating "By controlling the price of essential, bottleneck inputs to these non-facilities based providers, the ILEC controls a critical element of these carriers' underlying costs, and hence the prices they can offer (in competition with the ILEC)."

[18] Id.

[19] See, e.g., Level 3, at 2. Level 3 notes that it does not agree with AT&T that the TDM special access market can be ignored at this point, but does agree with AT&T's many filings that support the notion that the non-TDM special access market is increasingly important. Id., at 3.

[20] COMPTEL, at 2.

[21] Id., at 2.

anticompetitive prices and conduct will harm competition.[22]

Contrary to ILECs' claims, the Commission possesses the authority to reverse its forbearance decision.

ILECs raise procedural concerns with the Petition,[23] and also fault the Petition for relying on outdated data.[24] Among other things, Verizon states: "The forbearance grants that Petitioners ask the Commission to reverse have been in place for five years or more," and also "[t]oday, those grants are final and unreviewable."[25] ITTA similarly asserts that the Petition is "procedurally improper" and simply hopes to overturn prior rulings from both the FCC and the DC Circuit of Appeals.[26] Accordingly to ITTA, the FCC lacks the authority to reverse its forbearance decision; ITTA contends that once forbearance is granted, the statute is negated and the relevant regulation cannot be reinstated.[27]

However, as Rate Counsel observed in initial comments,[28] the Petitioners explained that in denying the appeal of the *AT&T Forbearance Order*:

> The court stated … that "the FCC's forbearance decision in this particular matter (or in the related Verizon and Qwest special access matters) is not chiseled in marble," and that "the FCC will be able to reassess as they reasonably see fit based on changes in market conditions, technical capabilities, or policy approaches to regulation in this area."[29]

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[22] MACC Members, at 2; see also COMPTEL Comments at 4..

[23] See, e.g., Verizon, at 17; CenturyLink, at 3, 11-13. Verizon states: "Under the Communications Act and the Commission's regulations, petitions for reconsideration must be filed within 30 days. The current petition is far too late." Verizon, at 20, cites omitted.

[24] See, e.g., Verizon, at 23-24; CenturyLink, at 4.

[25] Verizon, at 17.

[26] ITTA, at 2.

[27] Id., at 2-3, citing *Sprint Nextel Corp. v. FCC*, 508 3.d 1129, 1132 (D.C. Cir. 2007).

[28] Rate Counsel, at 4.

[29] Petition, at 18, citing *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009), at 911.

Because there is no specific language in Section 10 that covers reversal or modification of forbearance, Hawaiian Telcom contends that the FCC does not have the authority to do so.[30] As to the specific quote from the Court decision, which is included in Ad Hoc's Petition, Hawaiian Telcom asserts that the statement "is mere dicta made in the context of evaluating the Commission's general rulemaking powers without the benefit of a full briefing on the issue," and further contends that the court did not indicate how a forbearance decision could be 'reassessed.'"[31] Hawaiian Telcom also argues that the APA must be followed and that the FCC must, at a minimum, treat the Petition as a Petition for a rulemaking.[32] AT&T contends that Ad Hoc's petition is "essentially a stale request for reconsideration of fully litigated and reviewed Commission decision that are now six years (or more) old,"[33] and contends that Section 10 does not allow for a reversal of forbearance.[34] AT&T suggests that Section 10 was supposed to provide for regulatory certainty and that the ability to turn forbearance off and on like a switch would undermine its purpose.[35]

The ILECs are wrong. Joint Commenters agree with MACC Members that the Commission has the authority to reverse its forbearance decisions and concur with MACC Members' reliance on the DC Circuit's reasoning that the Commission can reassess its decision based on market circumstances.[36] MACC Members aptly argue that the Commission has "an

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[30] Hawaiian Telcom, at 6.

[31] Id., at 6-7.

[32] Id., at 7.

[33] AT&T, at 3.

[34] Id., at 4. See, also, id., at 10.

[35] Id., at 10.

[36] MACC Members, at 3, citing *Ad Hoc Telcomms. Users Comm. v. FCC*, 572 F.3d 903,911 (D.C. Cir. 2009). See also, id., at footnote 8, citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

obligation to revisit and reverse" its forbearance decisions given that they are not in line with the FCC's "current policy as reflected in the *Phoenix Forbearance Order*."[37] Joint Commenters urge the Commission to take the appropriate and necessary procedural steps to address the compelling merits of the Ad Hoc Petition. If and as may be necessary, the FCC could collect more recent empirical data, and assess non-TDM-based special access markets based on the *Phoenix Forbearance* analytic framework.

The FCC should apply the analytic framework that it established and applied in the *Phoenix Forbearance Order* to the non-TDM-based special access services market.

AT&T contends that, contrary to Ad Hoc's analysis, not only did the FCC predict that competition for broadband enterprise services would develop, but AT&T is indeed already facing competition for these services.[38] Regarding potential competition, AT&T states that "[t]he complaining carriers have built extensive fiber networks that are located within a short distance of the vast majority of special access demand."[39]

Moreover, ILECs dismiss Ad Hoc's suggestion that the FCC use the *Phoenix Forbearance Order* framework, arguing that the FCC acknowledged that such a framework might not be appropriate for advanced services, but only for legacy services.[40] AT&T expresses concern with the exclusion of cable companies and fixed wireless companies from Ad Hoc's

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[37] MACC Members, at 4, citing *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991). COMPTEL agrees with other commenters that the FCC has the authority to reverse its forbearance decisions (COMPTEL, at 4), citing the DC Circuit (at 5) and the FCC's forbearance orders (at 4).

[38] AT&T, at 23, citing AT&T Forbearance Order, at paras. 18, 22-27. Verizon contends that "competition for enterprise broadband services is even greater today than when forbearance was granted." Verizon at 4, see generally, id., at 4-27.

[39] AT&T, at 44.

[40] See, e.g., id., , at 7, 21; CenturyLink, at 4-5, 10, 19-21; Hawaiian Telcom, at 8, citing *Phoenix Forbearance Order*, at paras. 20, 39. See, also, AT&T, at 33-34 stating that the DC Circuit also did not find fault with the nationwide analysis of broadband services during the appeal.

analysis of the relevant market.[41] AT&T also argues that substitutes need only be reasonable, not exact, and that many businesses do consider cable and fixed wireless to be reasonable substitutes.[42]

Joint Commenters concur with MACC Members that the nationwide analysis used in the forbearance orders is incorrect and that the *Phoenix Forbearance Order* framework is more appropriate.[43] MACC Members also support the Petitioner's recommended framework for applying the traditional market power test.[44] MACC Members urge the Commission to revisit the forbearance decisions and in so doing, MACC Members predict that the Commission will find that at least one of the Section 10 forbearance criteria is not met anymore.[45] MACC Members further state that the FCC will find that the ILECs continue to be dominant in the provision of non-TDM based special access services if they follow the proposed analytical framework.[46] Similarly, COMPTEL supports the Petition's call for the FCC to use the framework established in the *Phoenix Forbearance Order*.[47] Of the framework, COMPTEL notes that the FCC concluded that it was "the precise inquiry specified in section 10(a)(1), and informs our assessment of whether carriers would have the power to harm consumers by charging supracompetitive rates."[48]

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[41] AT&T, at 35. See also CenturyLink, at 35-48; Verizon, at 8-17.

[42] AT&T, at 37-38.

[43] MACC Members, at 5.

[44] Id., at 5, citing Petition, at 4-7 and 30-56.

[45] MACC Members, at 5.

[46] Id., at 6.

[47] COMPTEL, at 3.

[48] Id., at 6-7, quoting *Qwest Phoenix Forbearance Order*, at para. 37.

Joint Commenters concur with COMPTEL that the FCC must justify why it should use "fundamentally different analytical methodologies" to determine market competition for different services.[49] The finding that "emerging" services should receive different treatment is flawed, according to COMPTEL, in part because a company with market power in the "legacy" market can preserve that dominance in the new service, because those services ultimately rely on the same facilities.[50] Additionally, the FCC's earlier conclusion that the services at issue are "emerging" is no longer valid: "Ethernet is the fundamental building block of the IP-based technologies being deployed in the PSTN today."[51]

COMPTEL aptly quotes the FCC's "National Broadband Plan":

> Unfortunately, the FCC's current regulatory approach is a hodgepodge of wholesale access rights and pricing mechanisms that were developed without the benefit of a consistent, rigorous analytic framework. Similar network functionalities are regulated differently, based on the technology used. Therefore, while networks generally have been converging to integrated, packet-mode, largely-IP networks, regulatory policy regarding wholesale access has followed the opposite trajectory. This situation undermines longstanding competition policy objectives.[52]

The Commission's failure to adequately regulate the non-TDM-based special access services market harms consumers.

Joint Commenters concur with Level 3 that the experience of the TDM special access market is instructive, and that if the FCC continues forbearance in the non-TDM market, similar anticompetitive results will continue.[53] Furthermore, Level 3 observes that it is difficult for the

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[49] COMPTEL, at 7.

[50] Id., at 7-8.

[51] Id., at 7. See, also, id., at 9-10.

[52] Id., at 9 and footnote 28, quoting from the FCC's "Connecting America: the National Broadband Plan" (2010), at 47.

[53] Level 3, at 4.

FCC to detect anticompetitive contracting because the grant of forbearance made those contracts confidential: "While the Commission acknowledged in granting forbearance that Sections 201 and 202 still apply, if the pattern of abuse of market power that may be (and that Level 3 believes is) taking place is done through confidential, unfiled contracts, it remains hidden by virtue of the grant of forbearance."[54]

COMPTEL provides an instructive attachment to its comments, specifically a study it commissioned to compare AT&T and CenturyLink Ethernet prices "to a comparable service constructed using the wholesale Ethernet offering of rural ILECs in NECA #5."[55] As noted by COMPTEL, one would expect the BOC rates to be lower than the rural ILECs' rates because one would expect the BOCs' costs to be lower than the rural ILECs' costs, due to economies of scale and scope. However, the study found that BOC prices are "often greater by an order of magnitude."[56] COMPTEL concludes: "If the rural ILECs can offer, at the rates embodied in NECA #5, a wholesale broadband transmission platform that can easily (and effectively) become a finished retail service comparable to the AT&T and CenturyLink services at a *fraction* of the price of AT&T and CenturyLink, then the only logical conclusion is that the AT&T and CenturyLink prices are unreasonably and unjustly inflated."[57]

The FCC should dismiss ILECs' thinly veiled threats to withhold broadband investment if the FCC grants the Petition.

Joint Commenters urge the FCC to dismiss the ILECs' unsupported attempt to link broadband investment with deregulation of non-TDM-based special access services.

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[54] Level 3, at 5.

[55] COMPTEL, at 10.

[56] Id.

[57] Id., at 11 (emphasis in original). Verizon was not included in the analysis because Verizon does not file its Ethernet prices publicly (COMPTEL, at footnote 34).

CenturyLink makes threats with respect to broadband investment,[58] and AT&T suggests that the incentive to invest in broadband would be negatively impacted by "onerous rate regulation" that the Petitioners are purportedly recommending.[59] Also, AT&T suggests that wholesale access to broadband at regulated prices "could only reduce" the incentive of competitors to build out their own networks, but provides no evidence.[60] Similarly, Hawaiian Telcom contends that regulating this market will reduce incentives to deploy broadband.[61] The ILECs' logic would appear to suggest that the FCC should forbear from regulation for the purpose of ensuring that ILECs' rates will be high, thus encouraging CLECs to deploy their own facilities. Joint Commenters urge the Commission to reject this ill-conceived approach to regulation. The goal of regulation is to ensure that the rates, terms, and conditions of the ILECs' non-TDM-based special access services are similar to those that would prevail in competitive markets. Where competitive forces are lacking, regulation is essential so that pricing signals are accurate.

Similarly, MACC Members propose that re-regulation of non-TDM-based special access services will advance the goals of Section 706 of the 1996 because

> competitors will be able to expand the size of their addressable market to include locations that they cannot serve today because of high ILEC wholesale prices for non-TDM-based special access services. Non-ILECs will then be able to serve more multi-location customers and to deploy fiber to such customers' multiple locations, including their high-demand locations. As a result, businesses, anchor institutions, and the U.S. economy as a whole will be the ultimate beneficiaries of such regulations.[62]

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[58] See, e.g., CenturyLink, at 1, raising concern about the impact of regulatory uncertainty on carriers' willingness to invest in next-generation IP networks and services, and id., at 5, suggesting that regulation would impede broadband investment. See id., at 29-34.

[59] AT&T, at 8. See, also, id., at 19-20.

[60] AT&T, at 9. See, also, id., at 32.

[61] Hawaiian Telcom, at 4.

[62] MACC Members, at 7 (cites omitted).

III. CONCLUSION

Joint Commenters urge the FCC to grant the Petition, reverse its earlier grant of forbearance, and apply dominant carrier regulation to non-TDM-based special access services to prevent incumbent local exchange carriers from exercising market power.

Respectfully submitted,

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